

N O. 2 2 4 4 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL ANGULO SALAZAR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
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I

STATEMENT OF JURISDICTION

On April 19, 1967, the defendant was indicted in one count of an eight count indictment by the Federal Grand Jury for the Central District of California for the concealment and transportation of over one kilogram of heroin in violation of Title 21, United States Code, Section 174 [C. T. 2]. ^{1/} Following a severance from his co-defendant and a trial by jury before the Honorable William P. Gray, United States District Judge, from May 31, 1967,

^{1/} "C. T. " refers to the Clerk's Transcript.

through June 2, 1967, appellant was found guilty.

Defendant was convicted and sentenced on June 27, 1967, to the custody of the Attorney General for seven years [C. T. 75].

Salazar filed, on June 6, 1967, a timely Notice of Appeal [C. T. 77].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 174.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported, or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000."

* * *

"Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. "

III

QUESTION PRESENTED

Whether the testimony of Chris Saiz to the effect that Alfred Sesma identified his "source" as being in the house was admissible.

IV

STATEMENT OF FACTS

On April 3, 1967, Chris Saiz, an agent of the Federal Bureau of Narcotics, met with Alfred Sesma, the co-indictee of Angulo-Salazar, in the vicinity of Sesma's residence [R. T. 111-112]. ^{2/} Sesma asked Saiz why he hadn't made any recent purchases of heroin from him and Saiz said because the heroin was of poor quality and he [Saiz] didn't want to make any more small purchases [R. T. 112]. When Sesma asked Saiz how much heroin

^{2/} "R. T. " refers to the Reporter's Transcript.

he wanted, Saiz responded by saying at least 35 ounces [R. T. 114]. When Saiz assured Sesma that he was serious, Sesma said he would call his source of heroin in Culiacan, Mexico [R. T. 114]. Sesma said he had to see the money before the call was placed and Saiz showed him a roll of \$2,700 [R. T. 114-15]. Sesma then said he would call his source of supply [R. T. 115]. After leaving Saiz's presence for about a half-hour, Sesma returned, said he had called his source in Mexico, but said he was not certain the heroin could be delivered on the sixth as Saiz wanted [R. T. 115].

Sesma then told Saiz to return on April the fifth with \$3,500 because the heroin would be \$100 per ounce [R. T. 115].

On April 5, 1967, Saiz met with Sesma [R. T. 116]. Sesma said he had received a call from his source in Mexico and delivery on the sixth could not be made [R. T. 116-117]. When Saiz demanded delivery on the sixth Sesma left and made a phone call [R. T. 117]. Sesma returned from the phone call and said he would definitely have the heroin on April 7 [R. T. 117]. At that time Sesma offered Saiz 8 or 10 ounces to tide him over [R. T. 118]. An appointment was then made to meet on April 7 [R. T. 119]. Sesma told Saiz to be at his [Sesma's] house at approximately 6:00 P. M. [R. T. 119].

On April 7, 1967, Saiz went to Sesma's residence and Sesma came out of the house [R. T. 121]. When Saiz asked Sesma if the heroin was available, Sesma said it was "but that he and his source of supply were in the process of packaging the heroin" [R. T. 121-122]. Sesma said his source of supply was inside

Sesma's house [R. T. 122]. Sesma then showed Saiz some heroin and said it was a sample of that which his source had just brought from Mexico [R. T. 122]. Then Sesma said " . . . he did not want me to talk to his source of supply at that time" and to wait in the area -- not to leave [R. T. 123]. Sesma told Saiz to wait in the street near the house so Sesma could see him at all times until the heroin was packaged [R. T. 123]. After some time Saiz knocked at the door and said he was tired of waiting [R. T. 123]. Sesma said it would be just a few minutes and invited Saiz into the house [R. T. 123]. As Saiz entered he saw the defendant Salazar standing near the dining room table with a pot [Ex. 1-E] containing heroin in front of him [R. T. 123-124]. Salazar was holding a flour sifter [Ex. 4] above the pot [R. T. 124-125], and was sifting heroin [R. T. 125]. Saiz was introduced to Salazar as "the man that was buying the heroin" [R. T. 125-126]. After Saiz sat down he complained that the past heroin had been of poor quality [R. T. 136]. Salazar said that "this heroin was of good quality" a number of times [R. T. 137]. Salazar said it was better than the heroin Saiz had received before [R. T. 137]. Salazar said that if Saiz were to have future transactions of the instant size that he could provide Sesma with the heroin [R. T. 137]. Salazar asked for a number of day's notice "because it was a long ways to travel to Culiacan" [R. T. 137]. Salazar asked Saiz to verify his reliability in providing narcotics with Sesma [R. T. 137]. Salazar said he had brought in heroin in the past and it was not difficult inasmuch as the people at the border were "rather stupid" [R. T. 138].



Sesma and Salazar asked Saiz to help them in the packaging and he did [R. T. 138].

After the arrest the heroin was seized and eventually admitted as Exhibit 1-B [R. T. 141, 146].

Following the arrest of Salazar, he admitted that he obtained the heroin from the people who made it in the Culiacan area [R. T. 194].

On direct examination the defendant testified that "the individual" gave him the package "to bring it over here" [R. T. 219]. A man promised him \$150 to take the little package "to the other side" [R. T. 220]. The package was received in Mexico [R. T. 222], and "Pinto" said to take it to Sesma [R. T. 223]. Salazar testified, he didn't "know for a fact" it was heroin [R. T. 228].

V

ARGUMENT

THE TESTIMONY BY CHRIS SAIZ THAT A
CO-CONSPIRATOR SAID HIS SOURCE WAS
INSIDE WAS ADMISSIBLE.

"In order that the declaration and conduct
of third parties may be admissible in such a case
it is necessary to show by independent evidence
that there was a combination between them. . . ."

Hitchman Coal & Coke Co. v. Mitchell,

245 U.S. 229, 249 (1917), quoted in

Fuentes v. United States, 233 F.2d 537

(9th Cir. 1960).

Appellant's only specification of error is that the relation by Chris Saiz of some statements of Alfred Sesma were merely narrative, and not in furtherance of the common scheme or conspiracy.

As the statement of facts, supra, shows, Saiz had been negotiating with Sesma for the purchase of 35 ounces of heroin. Saiz wanted the heroin on April 6, 1967, whereas Sesma said it could only be delivered on the seventh. When the two met on the seventh Sesma said it was there but a delay was necessary because the heroin was being packaged and Saiz would have to wait outside Sesma's house. In explanation of the delay and to assure Saiz that the evening would not be a waste of Saiz' time, Sesma made the following statements, whose admission are assigned as error: (1) "he (Sesma) and his source of supply were in the process of packaging the heroin [R. T. 122, lines 1-2; (2) " . . . his source of supply was presently inside of his residence, inside of the Sesma residence at 4228 Lindsey, and that he was packaging or preparing the heroin [R. T. 122, lines 5-7]; (3) "He told me that this was some of the heroin that his connection, his source of supply, had brought up from Mexico, and that this was some of the heroin that he was going to sell me" [R. T. 122, lines 12-15]; and (4) "He told me that he did not want me to talk to his source of

supply at that time, at that particular instance [sic], and he asked me to wait in the area until the heroin was packaged, and that he would call me" [R. T. 123, lines 1-4].

Without quarrelling with appellant's legal position, it is submitted that each statement narrated by Saiz, was made in furtherance of the conspiracy between Sesma and Salazar.

It is noted that no objection was made by the defendant at the trial that said statements were merely narrative as urged here. In the trial court, Salazar merely objected to entire lines of testimony on the ground that they constituted hearsay. Here, appellant readily acknowledges that a co-conspirator "cannot object to the declaration of a co-conspirator made to further the objects of the conspiracy . . ." [Op. Br., p. 8].

Appellant urges that the admission of the above testimony was prejudicial because Saiz did not identify Salazar as the source by admissible evidence [Op. Br., p. 12]. The Court's attention is directed to pages 136 to 138 of the Reporter's Transcript wherein Saiz related that Salazar, during the packaging phase of the operation, related that he had brought in heroin to Sesma before, this was good quality heroin, and he brought it in from Mexico himself. Aside from the above testimony Salazar admitted, after his arrest, that he brought in the heroin from Culiacan.

Appellant's argument that the cited testimony was merely narrative is wrong. The statements were made by Sesma in furtherance of an object of the conspiracy -- the delivery itself.



CONCLUSION

For the above stated reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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